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The Honorable James Ware

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*Attorneys for Plaintiff*

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

MARK OKANO, on behalf of himself and all  
others similarly situated,

Plaintiff,

v.

TREX COMPANY, INC., a Delaware  
corporation,

Defendant.

No. CV 09-01878 JW

**STIPULATION RE: FILING OF  
AMENDED COMPLAINT**

Pursuant to Fed. R. Civ. P. 15(a)(2), the undersigned parties stipulate and agree as follows:

1. Mark Okano is the plaintiff in *Okano v. Trex Company, Inc.*, CV 09-01878 JW, a case now pending in this judicial district. Mr. Okano filed his complaint on January 13, 2009, in the United States District Court for the Western District of Washington. The case was transferred to this Court on April 14, 2009 by order of the United States District Court for the Western District of Washington. It currently is pending before Judge Ware of the San Jose division of this Court.

2. The defendant, Trex Company, Inc. ("Trex"), answered Mr. Okano's complaint on February 25, 2009.

3. Pursuant to Fed. R. Civ. P. 15(a)(2), Mr. Okano asked Trex if it would agree to his filing the amended complaint attached hereto as Exhibit A. Trex has agreed.

Dated: June 1, 2009

HAGENS BERMAN SOBOL SHAPIRO LLP

By /s/ Steve W. Berman  
STEVE W. BERMAN

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*Attorneys for Trex Company, Inc.*

I, Jeff D. Friedman, am the ECF User whose ID and password are being used to file this STIPULATION RE: FILING OF AMENDED COMPLAINT. In compliance with General Order 45, X.B., I hereby attest that Rachel Chatman has concurred in this filing.

IT IS SO ORDERED:

The Stipulation is found as MOOT. The Plaintiff filed their Amended Complaint as a separate docket entry on June 9, 2009

Dated: June 12, 2009

  
United States District Judge

**CERTIFICATE OF SERVICE**

I hereby certify that on June 1, 2009, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses registered, as denoted on the attached Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

/s/ Jeff D. Friedman  
JEFF D. FRIEDMAN

# Exhibit A

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TREX COMPANY, INC., a Delaware  
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Defendant.

No. CV 09-01878 JW

FIRST AMENDED CLASS ACTION  
COMPLAINT FOR VIOLATIONS OF  
THE MAGNUSON-MOSS WARRANTY  
ACT, ARTICLE TWO OF THE  
UNIFORM COMMERCIAL CODE,  
AND STATE CONSUMER  
PROTECTION ACTS

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1 For their first amended complaint against Trex Company, Inc. (“Trex”), Mark Okano and  
2 Sharon Ding, on behalf of themselves and all others similarly situated, allege as follows:

3 **I. INTRODUCTION**

4 1. Like thousands of consumers across the country, plaintiffs purchased material  
5 manufactured by Trex to build a deck at their homes. Trex decking boards are not natural wood  
6 products; rather, they are composites made from recycled plastic and wood fibers. Trex touts its  
7 product as being superior to real lumber, and it prices the product accordingly. But the product has  
8 shown itself to be defective. It degrades, decomposes, rots, cracks, splits, checks, splinters, peels,  
9 delaminates, flakes, soaks up moisture, expands, swells, and develops mold and/or mildew and/or  
10 black or dark spots or streaking or deep discoloration or shadowing. Trex knows this, and it has  
11 acknowledged that it put defective material on the market.

12 2. Yet when consumers such as the plaintiffs complain and ask Trex to make things  
13 right, Trex responds by offering to replace the defective material with more Trex material – period.  
14 The company refuses to pay for the costs associated with repairing the deck, including the cost of  
15 labor to remove the defective material and to install the replacement boards. But as Trex well  
16 knows, these costs far exceed the cost of the boards themselves, such that Trex’s proffered remedy  
17 is really no remedy at all.

18 3. In refusing to pay these costs, Trex relies on a warranty document that purports to  
19 exclude liability for, among other things, such charges. This is not the first time that Trex has  
20 attempted to evade its responsibilities to consumers. In 2000 another class of purchasers of  
21 defective product sued Trex after its members met with Trex’s recalcitrance in their efforts to seek  
22 adequate remedies. That case settled with a provision that Trex would pay for replacement labor  
23 costs. But Trex learned no lasting lesson. Trex is now employing the same hard-nosed and  
24 unlawful tactics that led to the previous suit. In fact, Trex’s behavior is especially egregious given  
25 that it has acknowledged widespread defects in the product it placed on the market; it is said to  
26 have placed \$45 million in reserve to deal with future losses stemming from the claims of  
27 consumers for replacement materials.





1 Okano and his family cannot enjoy their deck. Mr. Okano has been injured by Trex's breach of  
2 warranty with respect to these defective goods and by Trex's refusal to provide adequate redress in  
3 response to his warranty claim.

4 8. Plaintiff Sharon Ding is a resident of Altadena, California. She purchased her Trex  
5 decking material from a Home Depot in 2006. Towards the end of 2008, she began to notice that  
6 defects were manifesting in the decking material. Her story is set forth in greater detail below.

7 **B. The Defendant**

8 9. The defendant, Trex, is a Delaware corporation with its principal place of business  
9 in Winchester, Virginia. It describes itself as the nation's largest manufacturer of "wood-  
10 alternative" decking, railing, and fencing products. Trex is a spinoff of ExxonMobil Oil  
11 Corporation (which was known as Mobil Oil Corporation as of the time of the spinoff).

12 **IV. GENERAL ALLEGATIONS**

13 **A. Plaintiffs' Experiences with Trex's Defective Decking Material**

14 10. Trex heavily advertises its decking products directly to consumers, including by  
15 way of advertisements and its Internet web site. Currently, for example, Trex states that the plastic  
16 in its materials "shields the wood from moisture and insect damage, preventing rotting and  
17 splintering." It underscores the supposedly splinter-free nature of its product by advertising it as  
18 safe for bare feet. It states that "[t]he maintenance problems that come with wood decks don't  
19 come with Trex." It claims that its decking material "will not rot or deteriorate due to harsh  
20 weather or insects." It represents that "Trex resists damage from moisture and sunlight, making it  
21 the natural choice for pools, hot tubs and spas." And it claims that its decking and railing products  
22 "require only periodic cleaning to stay beautiful for years to come – no need for sanding, staining  
23 or painting, ever." What is more, its written warranty documents put forth the claims that for 25  
24 years its decking material "shall not check, split, splinter, rot or suffer structural damage from  
25 termites or fungal decay." The essence of its marketing strategy is to tout its composite materials  
26 as superior to real wood products – as the best material available for decking. In tandem with this  
27 marketing strategy, Trex charges prices for its supposedly premium products that are well in excess  
28 of those charged for lumber materials.

11. Plaintiff Okano's experience with Trex typifies the experiences of other named plaintiffs and prospective class members. In June 2005, having been convinced by Trex marketing that Trex decking material not only was suitable for his planned new deck but actually superior to real lumber, Mr. Okano directed his contractor to purchase a quantity of Trex decking boards for installation at his home. Before directing his contractor to make the purchase, however, Mr. Okano visited a local building supplier, Grey Lumber in Tacoma, Washington, that carried an assortment of decking materials, including the product made by Trex. Though Mr. Okano indicated interest in the Trex product, he was not given nor shown a copy of any Trex warranty document, nor did the supplier discuss any warranty terms with him. He did, however, receive pamphlets touting the superiority of Trex decking material. And when Mr. Okano's contractor purchased the material on Mr. Okano's behalf at the location that Mr. Okano had visited, the contractor also was not given nor shown a copy of any Trex warranty document, nor did the supplier discuss any warranty terms with him. Indeed, Mr. Okano has no recollection of having received any sort of Trex warranty document, or being advised of any Trex warranty terms, either personally or via his contractor, before, at, or around the time of purchase.

12. The cost of Mr. Okano's deck, including the Trex materials and labor, was \$9,500. Not long after the installation of the decking material at Mr. Okano's home, the material began to show serious defects. Specifically, after approximately two years from the time the deck was installed, several decking boards began to rot, expand, and degrade. These defects rendered the deck, which is elevated some 8-10 feet above ground level, not only unsightly but also unsafe. In or about July or August 2008, Mr. Okano contacted his contractor and building supplier to report the problems that had developed. They responded by giving him the contact number for Trex's claims department.

13. When Mr. Okano contacted the Trex claims department and advised of the problems with the decking boards in or about August 2008, the agent responded by advising that he would send claims materials for Mr. Okano to complete.

14. Next, Trex sent a letter to Mr. Okano that was dated August 14, 2008. The letter indicated that in response to Mr. Okano's recent inquiry with the Customer Relations Department,

1 Trex was enclosing a “Trex Company Concern Form and Limited Warranty for [his] review.” The  
 2 letter asked that the form be completed and that the form and requested materials, including proof-  
 3 of-purchase documentation, verification of ownership of the real property where the deck was  
 4 installed, and photographs, be returned to Trex for processing and review.

5 15. The referenced Limited Warranty sent to Mr. Okano with Trex’s August 14, 2008  
 6 letter is more fully entitled “Trex 25 Year Limited Warranty.” This was the first time that  
 7 Mr. Okano had ever seen this document or its terms. The document provides that Trex

8 warrants to the original consumer purchaser . . . for a period of  
 9 twenty-five (25) years from the date of original consumer purchase,  
 10 under normal residential use and service conditions, [that] Trex  
 11 products shall be free from material defects in workmanship and  
 12 materials, and shall not check, split, splinter, rot or suffer structural  
 13 damage from termites or fungal decay. If a defect occurs within the  
 14 warranty period, Purchaser shall notify Trex in writing and, upon  
 confirmation by an authorized Trex representative of the defect,  
 Trex’s sole responsibility shall be, at its option, to either replace the  
 defective item or refund the portion of the purchase price paid by  
 Purchaser for such defective item (not including the cost of its initial  
 installation).

15 The document also provides that the “warranty shall not cover and Trex shall not be responsible for  
 16 costs and expenses incurred with respect to the removal of defective Trex products or the  
 17 installation of replacement materials, including but not limited to labor and freight.” The foregoing  
 18 purported limitations and exclusions do not appear in bolded, larger, or different-colored type.

19 16. In addition, the document contains the following language in capitalized (though not  
 20 bolded, oversize, or different-colored) type:

21 EXCEPT AS SET FORTH ABOVE, THERE ARE NO  
 22 WARRANTIES, EXPRESS OR IMPLIED, WITH RESPECT TO  
 23 TREX PRODUCTS. TREX EXPRESSLY EXCLUDES AND  
 24 DISCLAIMS ANY IMPLIED WARRANTY OF  
 25 MERCHANTABILITY AND ANY WARRANTIES OF FITNESS  
 26 FOR A PARTICULAR PURPOSE, APPLICATION OR USE.  
 27 UNDER NO CIRCUMSTANCES WILL TREX BE LIABLE FOR  
 28 SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES,  
 WHETHER SUCH DAMAGES ARE SOUGHT IN CONTRACT,  
 IN TORT (INCLUDING BUT NOT LIMITED TO NEGLIGENCE  
 AND STRICT LIABILITY) OR OTHERWISE, AND TREX’S  
 LIABILITY WITH RESPECT TO DEFECTIVE PRODUCTS  
 SHALL IN NO EVENT EXCEED THE REPLACEMENT OF  
 SUCH PRODUCTS OR REFUND OF THE PURCHASE PRICE,  
 AS DESCRIBED ABOVE.

1 It bears repeating that this was the first time that Mr. Okano had ever seen such language  
2 supposedly associated with his purchase of Trex decking material.

3 17. Mr. Okano completed the form as requested. Under the heading “Description of  
4 Concern,” Mr. Okano wrote: “Deterioration, flaking, erosion of decking boards – strength and  
5 integrity of boards is compromised, weakened and unsafe.” He also compiled the materials  
6 requested by Trex. In addition, he procured a letter from his contractor dated September 2, 2008,  
7 in which the contractor advised that in August 2008 he had inspected the deck and “noticed that  
8 deck materials were starting to decompose in center of deck runs and around butt joints.” The  
9 contractor concluded by asking that a Trex representative be sent to “look at [the] problem so we  
10 can find a solution to repair said deficiencies and make it safe for family to use this deck.” On or  
11 about September 11, 2008, Mr. Okano signed the form and returned it with the supporting  
12 materials, including his contractor’s letter, to Trex.

13 18. Though Trex’s August 14, 2008 letter had asked that Mr. Okano allow “two to four  
14 weeks for processing and review of [his] documentation,” Trex responded more than six weeks  
15 after Mr. Okano submitted the requested items. In its October 30, 2008 letter, Trex expressed its  
16 “commitment to resolve the identified conditions” by offering to ship “replacement materials for  
17 the affected boards on [Mr. Okano’s] deck.” More specifically, the company indicated that it  
18 would ship to his residence at no cost “113” boards measuring “5/4x6x16” each. But that was all  
19 that Trex offered to do. No offer was made to pay for the costs associated with repairing the deck,  
20 including the costs for the labor necessary to remove and replace the defective boards.

21 19. In return for its offer to provide the replacement materials, the company asked for a  
22 release from any “further liabilities, losses, or claims relating to the affected Trex material and/or  
23 its replacement.” It also asked for Mr. Okano’s agreement that he would keep the “settlement”  
24 confidential and “refrain from making any negative or disparaging remarks to any third party  
25 regarding Trex or the quality of its products.”

26 20. Mr. Okano did not accept Trex’s unfair and inadequate offer, nor did he agree to  
27 Trex’s unfair requests. To this day, as a result of Trex’s acts and omissions, Mr. Okano and his  
28 family cannot enjoy their deck because it was constructed with supposedly premium materials that

1 turned out to be seriously defective. Indeed, Mr. Okano recently has noticed dark or black  
2 discoloration and visible shading on areas of his deck, and the deterioration, flaking, and swelling  
3 originally reported has worsened and begun to develop in new places since the filing of the initial  
4 Complaint in this matter. Upon information and belief, it will cost thousands of dollars in labor  
5 and supplies (above and beyond replacement boards) to repair Mr. Okano's deck, together with  
6 costs attendant to disposing of the defective material. Mr. Okano has been damaged by Trex's  
7 breach of warranty and by its refusal, in an unfair claims process, to provide him with lawful and  
8 adequate redress for his claim.

9         21. Others have similar stories to tell. For example, plaintiff Ding, having been  
10 impressed by Trex's marketing claims, purchased her decking material in 2006 and a contractor  
11 installed it for her thereafter. In late 2008 flaking, bubbling, deterioration, and mold and/or black  
12 marks or black shadows began to manifest in the product. She filed a claim with Trex; Trex  
13 dispatched an inspector; and, thereafter, Trex offered to replace all of the boards in her deck with  
14 new Trex material. When Ms. Ding asked Trex to cover the cost of labor for removal and  
15 replacement of the boards, Trex refused. Ms. Ding, in turn, refused to accept Trex's unfair offer.  
16 Accordingly, to date, Ms. Ding is stuck with a defective deck whose condition continues to worsen.  
17 The last cost estimate for labor to replace the boards which thus far have manifested defects was  
18 some \$3,200.00, in addition to costs attendant to disposing of the defective material.

19 **B. Previous Class-Action Lawsuit**

20         22. As referenced above, consumers commenced a previous and similar nationwide  
21 class-action lawsuit relating to defective Trex products sometime in 2000. In that lawsuit,  
22 *Kanefsky v. Trex Company, Inc.*, plaintiffs sued Trex and two related entities in the Superior Court  
23 of New Jersey, alleging that defendants had violated state and common law by negligently  
24 misrepresenting the characteristics of Trex, Timbrex, or Rivenite Products; had breached contracts;  
25 had breached implied or expressed warranties; and had defrauded consumers between January 1,  
26 1992 and July 31, 2004 ("*Kanefsky* class period").

27         23. In May 2004, the court certified settlement classes consisting of persons who  
28 purchased the referenced products during the *Kanefsky* class period and "all persons who

1 subsequently own such products.” According to a June 2, 2004 press release from the law firm  
2 representing the plaintiffs in the New Jersey class action, the plaintiffs claimed that the warranty  
3 issued by Trex (and ExxonMobil) was unconscionable and called for reformation. The court  
4 certified a nationwide settlement class on this issue.

5       24. According to that same press release, the court also certified a settlement class of  
6 New Jersey consumers on claims that the sale, marketing and distribution of allegedly defective  
7 Trex lumber products (and its predecessor product Timbrex) violated the New Jersey Consumer  
8 Fraud Act (“NJCFA”) and breached express and implied warranties. The New Jersey plaintiffs  
9 sought treble damages pursuant to the NJCFA.

10       25. The New Jersey court approved a settlement among the parties on or about  
11 December 17, 2004. As part of the settlement, the defendants agreed to reform the Trex product  
12 warranty to remove a disclaimer of implied warranties. (Yet, as can be seen above, Trex continues  
13 to adhere to a warranty document that contains purported disclaimers of the implied warranties of  
14 merchantability and fitness for a particular purpose.) Among the other relief to which Trex agreed  
15 was that, upon proper proof of claim, it would “provide for the cost of the replacement of any  
16 Product (including labor costs) that is replaced under the terms set forth above [which terms detail  
17 the characteristics of certain defects].” (Notice of Class Action Determination, Class Description,  
18 Pendency of Proposed Settlement, and Hearing on Settlement, Superior Court of New Jersey, Law  
19 Division, Essex County, No. L-7347-00.)

### 20 **C. Continuing Problems with Trex Products**

21       26. According to a November 26, 2007 article in the *Washington Post*, Trex reported in  
22 early November 2007 that “a small portion of its products manufactured at its Fernley, NV, plant  
23 from 2003 to 2006 were [sic] beginning to peel two to three years after being installed. The  
24 company set aside \$45 million in reserves to cover future losses from customers who might seek  
25 replacements.” (It should be noted that plaintiffs are without sufficient knowledge to allege that  
26 the defective product about which they complain was all manufactured at Trex’s Fernley, NV,  
27 plant from 2003 to 2006, and they do not do so.)



1           27.     The article goes on to report that growth in the composite decking materials  
2 business has been “gradual, if steady. Composite decking materials captured 17 percent of the \$3.3  
3 billion market for decking products in 2006, up from 5 percent a decade ago.” “Trex, the pioneer,  
4 remains a dominant force in the segment.”

5           28.     But in spite of Trex’s success in the marketplace, numerous complaints about Trex  
6 decking material and Trex’s response to complaints can be found online. In one forum posting a  
7 consumer experiencing problems with his or her Trex deck suggests that installer error may have  
8 led to some of the issues with the poster’s decking, but he or she also points to deteriorating Trex  
9 boards. The customer reports complaining to Trex, which agreed to replace four boards but not to  
10 pay for labor. He or she also was asked to sign a release.

11           29.     The first response to this post states: “You have just become a member of a very  
12 large club. Do a search on this site for more engaged [sic] t=junk customers.” Another poster  
13 remarks that now, “besides the cracked, deteriorated decking you can look forward to black mold  
14 forming all over the shaded areas.”

15           30.     Still another poster claims that problems with Trex decking develop because of the  
16 “cooling down process” used in manufacturing.

17           33.     Also, as alleged herein and as otherwise reported, certain buyers of Trex products  
18 are experiencing extensive and serious mold and/or mildew and/or discoloration and/or dark  
19 spotting or streaking or shadowing of their product. It is unknown at present whether these  
20 particular defects are actually surface mold or mildew, or whether they are expressions of glue or  
21 binder or some other product constituent or constituents that is or are seeping up through the  
22 product, or all of the above.

## 23                                   **V.     CLASS ACTION ALLEGATIONS**

24           34.     Plaintiffs bring this action pursuant to Rule 23 of the Federal Rules of Civil  
25 Procedure, specifically Rules 23(b)(2) and 23(b)(3), on behalf of the following Class (the “Class”):

26                   All consumers in the United States who, at any time from August 1,  
27                   2004, through the date of entry of judgment, themselves or via an  
28                   agent, purchased any Trex decking material for any consumer or  
                    household use, or who were transferred ownership of the decking  
                    material or any structures containing it, where such decking material,



or any part thereof, has exhibited defects, including but not limited to, degradation, delamination, peeling, rot, splintering, checks, cracks, decomposition, flaking, disintegration, bowing, expanding, swelling, a failure to resist moisture, and/or molding or mildewing or other dark spotting, discoloration, streaking, or shadowing, and where Trex has not paid, or has not agreed to pay, all costs and expenses associated with removing and disposing of the defective material and replacing it with non-defective material, including any shipping or delivery costs, the cost of labor to remove the defective material and to install replacement material, and the cost of disposal of the defective material. Also included in the class are all consumers in the United States who, at any time from August 1, 2004, through the date of entry of judgment, themselves or via an agent, purchased any Trex decking material for any consumer or household use, or who were transferred ownership of the decking material or any structures containing it, and who at any time were provided a Trex warranty document purporting to limit Trex's liability for defective decking material to replacement of the defective material or a refund for the purchase price of the defective material, at its election. Excluded from the Class are officers, representatives, or agents of Trex.

35. Upon information and belief, there are thousands of members in the above-described Class. The exact number and identities of fellow members, however, are presently unknown to plaintiffs, but they are known to Trex and ascertainable via appropriate discovery.

36. Among the questions of law and fact common to the Class are:

- a. Are the Trex decking materials at issue in this lawsuit defective?
- b. Is the mix of materials, or any material, used to make Trex decking materials a cause of the defects alleged?
- c. Is the manufacturing process a cause of the defects alleged?
- d. When did Trex realize that the decking products it was placing on the market were defective?
- e. Are the purported exclusions of liability in Trex warranty documents for consequential and incidental damages, and, more particularly, for removal and installation labor and freight charges, conspicuous?
- f. In Trex warranty documents, is the purported limitation of liability to replacement of defective material, or a refund for the purchase price, conspicuous?
- g. Are Trex's purported disclaimers of the implied warranties of merchantability and fitness for a particular purpose valid?

1                   h.       Did Trex make, or have a program for making, written warranties readily  
2 available for examination by prospective buyers of its products?

3                   i.       With respect to Trex warranty documents, are Trex's purported exclusions  
4 of liability for consequential and incidental damages, including for freight charges and labor costs,  
5 conscionable, valid, and enforceable?

6                   j.       Were the defects in the Trex decking materials latent?

7                   k.       Have the limited remedies that Trex purports to offer failed of their essential  
8 purpose?

9                   l.       Does Trex have a program in place to discourage consumers who bought  
10 defective Trex product from seeking all remedies lawfully available to them?

11                  m.       Is part of Trex's strategy to discourage consumers from seeking full redress  
12 the dissemination of warranty documents that purport to disclaim implied warranties, in violation  
13 of its pledge in the New Jersey settlement agreement, duly entered by the New Jersey court, to  
14 strike those disclaimers from its written warranties?

15                  n.       Is part of Trex's strategy to discourage consumers from seeking full redress  
16 the inclusion in its warranty documents of purported exclusions of liability for consequential and  
17 incidental damages, including for freight charges and labor costs, even though Trex knows that  
18 such purported exclusions are unconscionable, invalid, and not enforceable under the  
19 circumstances of the consumer transactions at issue?

20                  o.       Has Trex placed products on the market with the knowledge that they were  
21 defective, or likely to be defective?

22                  p.       Has Trex advertised its products as having characteristics that they do not  
23 have?

24                  q.       Has Trex acted deceptively or unfairly or unconscionably in the marketing  
25 of its products?

26                  r.       Has Trex acted deceptively or unfairly or unconscionably in addressing the  
27 complaints of consumers who purchased or acquired defective Trex decking materials?

28                  s.       Are Trex's warranty documents subject to reformation?

1           37. Plaintiffs' claims are typical of the Class because plaintiffs and all members of the  
2 Class were injured in the same manner by Trex's violations of provisions of the Magnuson-Moss  
3 Warranty Act; by its violations of provisions of Article 2 of the Uniform Commercial Code, as  
4 enacted in the various states, and related principles; and by its unfair or deceptive or  
5 unconscionable acts and practices as defined by the consumer protection laws of the various states.

6           38. Plaintiffs will protect fully and adequately the interests of all members of the Class.  
7 Plaintiffs have retained counsel who are experienced in consumer class-action litigation. Plaintiffs  
8 have no interests which are adverse to, or in conflict with, other members of the Class.

9           39. The questions of law and fact common to the members of the Class predominate  
10 over any questions which may affect only individual members.

11           40. A class action is superior to other available methods for the fair and efficient  
12 adjudication of this controversy. The Class is readily definable, and prosecution as a class action  
13 will eliminate the possibility of duplicative litigation, while also providing redress for claims which  
14 otherwise would be too small to support the expense of individual litigation.

15           41. Furthermore, Trex has acted or refused to act, as alleged herein, on grounds  
16 generally applicable to the Class, thereby making appropriate final injunctive relief or  
17 corresponding declaratory relief with respect to the Class as a whole.

## 18           **VI. TOLLING AND APPLICATION OF THE DISCOVERY RULE**

19           42. The defects complained of were latent and not detectable until manifestation, even  
20 upon reasonable inspection and all due diligence; therefore, plaintiffs and the members of the  
21 putative Class were not able to discover these defects until after purchase and installation of Trex's  
22 product.

23           43. Trex knew of the defects complained of prior to the time of sale, and it concealed  
24 this critical information from the plaintiffs and all Class members and consumers. All applicable  
25 statutes of limitation have, therefore, been tolled by Trex's concealment of material facts.

26           44. Trex is estopped from relying upon any otherwise applicable statutes of limitation  
27 because of its concealment of the defects of which plaintiffs complain.  
28



1           51.     Trex's written warranties also contain purported disclaimers of the implied  
2 warranties of merchantability and fitness for a particular purpose. These disclaimers are ineffective  
3 pursuant to 15 U.S.C. § 2308(a) and (c).

4           52.     In addition, neither plaintiff Okano nor his contractor, his agent for purposes of  
5 purchasing the Trex decking material at issue, recalls receiving a written warranty document  
6 before, at, or around the time that the material was purchased. Mr. Okano also does not recall  
7 having seen any copies of the warranty documents displayed at the supply house where the decking  
8 material was purchased. This is typical of the experience of other plaintiffs and Class members.  
9 Trex's failure to assure that its written warranties be made readily available for examination by  
10 prospective buyers violates Magnuson-Moss. 16 C.F.R. § 702.3.

11           53.     Finally, at the time this purported warranty was issued, Trex knew that it had not  
12 fixed the process of manufacturing that led to the defective boards that were the subject of the  
13 earlier class action – thus, the disclaimers were unconscionable because they disclaimed a defect  
14 known but not disclosed.

15           54.     Trex's acts and omissions in violation of Magnuson-Moss are “[u]nfair methods of  
16 competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting  
17 commerce,” and, accordingly, they are unlawful. 15 U.S.C. § 2310(b); 15 U.S.C. § 45(a)(1).

18           55.     Plaintiffs and the Class members they seek to represent have suffered damages as a  
19 result of Trex's breach of warranty and its failures to comply with its lawful obligations under its  
20 written and implied warranties, in particular by way of Trex's refusal to pay for labor costs  
21 associated with removal of the defective Trex decking material and re-installation of the  
22 replacement decking material and any supplies needed to remove the defective material and to re-  
23 install the replacement material. Class members also have suffered recoverable damages where, in  
24 purported reliance on exclusionary language in its written warranty documents, Trex has refused to  
25 pay shipping charges for replacement product.

26           56.     Magnuson-Moss provides for “other legal and equitable” relief where there has been  
27 a breach of warranty or failure to abide by the obligations that Magnuson-Moss imposes. 15  
28 U.S.C. § 2310(d)(1). Plaintiffs and the Class they seek to represent ask for a reformation of Trex's

warranty documents to comport with Trex's obligations under Magnuson-Moss. In addition, they ask that Trex be enjoined from acting unlawfully as alleged herein, including with respect to its practices aimed at discouraging consumers who purchased defective Trex product from seeking the full panoply of remedies available to them.

57. Magnuson-Moss also provides for an award of costs and expenses, including attorneys' fees, to prevailing consumers in connection with the commencement and prosecution of lawsuits thereunder, unless the Court in its discretion determines that such an award would be inappropriate. 15 U.S.C. § 2310(d)(2). Plaintiffs and the prospective Class intend to seek such an award as prevailing consumers at the conclusion of this lawsuit.

## COUNT II

### **Breach of Warranty and Violations of Article 2 of the Uniform Commercial Code**

58. Plaintiffs restate the preceding paragraphs and incorporate them here by this reference.

59. Where adopted, Article 2 of the Uniform Commercial Code (sometimes "U.C.C.") governs transactions in goods and warranty rights and obligations.

60. Trex extends a written warranty directly to consumers. It warrants that for a period of 25 years, "Trex products shall be free from material defects in workmanship and materials, and shall not check, split, splinter, rot or suffer structural damage from termites or fungal decay." In fact, however, the Trex products purchased by the plaintiffs were not free from defects, and they have exhibited checking, splitting, splintering, rot, and structural damage, among other defects.

61. In addition, at the time this purported warranty was issued, Trex knew that it had not fixed the process of manufacturing that led to the defective boards subject of the earlier class action – thus, the disclaimers were unconscionable because they purported to disclaim a defect known but not disclosed.

62. In the written warranty document it sent to plaintiff Okano and others after they advised of the defects in their decking material, Trex purports to exclude liability for consequential and incidental damages a) generically, by way of references to "special, incidental or consequential damages"; b) specifically, by way of references to removal and installation labor costs and freight

1 charge; and c) implicitly, by purporting to provide only for replacement or refund, at its option,  
2 relative to defective goods.

3 63. These purported exclusions or limitations of liability were never negotiated between  
4 Trex, a powerful corporation with immense bargaining power on the one hand, and on the other,  
5 the plaintiff consumers. For example, plaintiff Okano never even saw these purported exclusions  
6 and limitations – which are not conspicuous in the warranty document in any event – until *after* he  
7 sought redress relative to the defective product he purchased some three years prior.

8 64. Under these circumstances, Trex's purported exclusions or limitations of liability  
9 are unconscionable and invalid. *E.g.*, RCW 62A.2-302(1); RCW 62A.2-719(3).

10 65. What is more, the defects in the Trex material sold to plaintiffs were latent and non-  
11 discoverable by reasonable inspection at the time plaintiffs purchased the goods. Furthermore,  
12 decking materials are intended to be installed in structures; when these materials fail, any materials  
13 meant to replace defective boards must be transported to the place of the structure and labor is  
14 necessary to remove the defective material, to dispose of it, and to replace it with replacement  
15 material.

16 66. Under these circumstances, a purported limitation or exclusion of the partial but  
17 necessary remedies of payment or reimbursement for shipping charges and the cost of removal and  
18 replacement labor causes the purportedly limited remedy set forth in Trex's warranty document to  
19 fail of its essential purpose.

20 67. Furthermore, Trex's purported disclaimers of the implied warranties of  
21 merchantability and fitness for a particular purpose are not valid in that they are inconspicuous and  
22 fail to set forth with particularity the qualities and characteristics of the decking material which are  
23 not being warranted. *E.g.*, RCW 62A.2-316(2) and (4).

24 68. Given these facts and circumstances, plaintiffs are entitled to the full panoply of  
25 remedies provided under Article 2 of the U.C.C. as adopted by the various states, as well as all  
26 other applicable remedies. *E.g.*, RCW 62A.2-316(1); RCW 62A.2-719(2). These include  
27 replacement of the defective decking material with non-defective material of at least the quality  
28 and grade marketed and promised, shipment of replacement material to the plaintiffs' homes, the

1 cost of labor to remove the defective material, the cost to dispose of the defective material, and the  
 2 cost of labor and supplies necessary to install the replacement materials – all at Trex’s expense.

3 69. The Uniform Commercial Code, including Article 2 on Sales, was meant to  
 4 harmonize the law governing commercial transactions across the United States. Every state in the  
 5 Union has adopted the Uniform Commercial Code, though Louisiana has not adopted Article 2 on  
 6 Sales.

7 70. Trex has marketed its decking material nationwide throughout the Class Period.  
 8 Upon information and belief, Trex has behaved similarly in its dealings with, and has proffered  
 9 similar warranty documents long after sales have occurred to, consumers across the United States  
 10 who have complained about defective goods and Trex’s breaches of warranty. Accordingly, not  
 11 only does Washington’s Article 2 apply as indicated, but the corresponding provisions of Article 2  
 12 of the U.C.C. apply with respect to the claims of putative Class members in the 48 other states (and  
 13 the District of Columbia) where they have been adopted.

14 71. Applicable sections of Washington’s Article 2 are quoted above. Companion  
 15 codifications of Article 2 of the U.C.C. are found as follows:

- 16 a. Ala. Code § 7-2-101, *et seq.*
- 17 b. Alaska Stat. § 45.02.101, *et seq.*
- 18 c. Ariz. Rev. Stat. § 47-2101, *et seq.*;
- 19 d. Ark. Code § 4-1-2, *et seq.*;
- 20 e. Cal. Com. Code § 2101, *et seq.*;
- 21 f. Colo. Rev. Stat. § 4-3-101, *et seq.*;
- 22 g. Conn. Gen. Stat. § 42a-2-101, *et seq.*;
- 23 h. 6 Del. Code § 2-101, *et seq.*;
- 24 i. D.C. Code § 28:2-101, *et seq.*;
- 25 j. Fla. Stat. § 672.101, *et seq.*;
- 26 k. Ga. Code § 11-2-101, *et seq.*;
- 27 l. Haw. Rev. Stat. § 490:2-101, *et seq.*;
- 28 m. Idaho Code § 28-2-101, *et seq.*;



- n. 810 Ill. Comp. Stat. § 5/2-101, *et seq.*;
- o. Ind. Code Ann. § 26-1-2-101, *et seq.*;
- p. Iowa Code § 554.2101, *et seq.*;
- q. Kan. Stat. § 84-2-101, *et seq.*;
- r. Ky. Rev. Stat. § 355.02.101, *et seq.*;
- s. Me. Rev. Stat. § 11. 2-101, *et seq.*;
- t. Md. Com. Law Code § 2-101, *et seq.*;
- u. Mass. Gen. Laws 106:2-101, *et seq.*;
- v. Mich. Stat. § 440.2101, *et seq.*;
- w. Minn. Stat. § 336.2-101, *et seq.*;
- x. Miss. Code Ann. § 75-2-101, *et seq.*;
- y. Vernon's Mo. Rev. Stat. § 400.2-101, *et seq.*;
- z. Mont. Code Ann. § 30-2-101, *et seq.*;
- aa. Neb. Rev. Stat. § UCC-2-101, *et seq.*;
- bb. Nev. Rev. Stat. § 104.2101, *et seq.*;
- cc. N.H. Rev. Stat. § 382-A:2-101, *et seq.*;
- dd. N.J. Stat. Ann. § 12A:2-101, *et seq.*;
- ee. N.M. Stat. Ann. § 55-2-101, *et seq.*;
- ff. N.Y. Gen. Bus. Law § UCC-2-101, *et seq.*;
- gg. N.C. Gen. Stat. § 25-2-101, *et seq.*;
- hh. N.D. Cent. Code § 41-02-01, *et seq.*;
- ii. Ohio Rev. Stat. § 1302.01, *et seq.*;
- jj. Okla. Stat. tit. § 12A-2-101, *et seq.*;
- kk. Or. Rev. Stat. § 72.1010, *et seq.*;
- ll. 13 Pa. Consol. Stat. § 2101, *et seq.*;
- mm. R.I. Gen. Laws. § 6A-2-101, *et seq.*;
- nn. S.C. Code Laws § 36-2-101, *et seq.*;
- oo. S.D. Code Laws § 57A-2-101, *et seq.*;

- pp. Tenn. Code § 47-2-101, *et seq.*;
- qq. Tex. Bus. & Com. Code § 2.102, *et seq.*;
- rr. Utah Code Ann. § 70A-2-101, *et seq.*;
- ss. Vt. Stat. Ann. tit. 9A, § 2-101, *et seq.*;
- qq. Va. Code Ann. § 8.2-101, *et seq.*;
- uu. W. Va. Code § 46-2-101, *et seq.*;
- vv. Wis. Stat. § 402.101, *et seq.*; and
- ww. Wyo. Stat. § 34.1-2-101, *et seq.*

As to the claims of Louisiana residents, the Civil Code of that state applies.

### COUNT III

#### Violation of Consumer Protection Statutes

72. Plaintiffs restate the preceding paragraphs and incorporate them here by this reference.

73. Trex's conduct and omissions, as alleged in this complaint, constitute unfair or deceptive or unconscionable acts or practices in violation of the consumer protection acts (this term is used broadly) of the various states. Such behavior is unlawful. Trex's continuing violations of law include, but are not limited to:

a. Placing on the market decking materials that were known to be defective, or that were known as likely to be defective, while representing that those products were free from material defects;

b. Marketing, promoting, and advertising its product as having uses, characteristics, or benefits that it did not have, and as being of a certain standard, quality, or grade, when really it was of another;

c. Promoting its product as superior to alternatives, including natural lumber alternatives, and charging higher prices for it, while knowing that in fact it was not superior to alternatives such as natural lumber;

1                   d.       Failing to negotiate disclaimers of warranties and limitations or exclusions  
2 of liability and remedies, which were and are unconscionable under the facts and circumstances,  
3 and then inserting them into warranty documents anyway;

4                   e.       Sending the warranty documents referenced in the preceding subparagraph  
5 d, with the purported disclaimers, limitations, and exclusions, to consumers who reported that their  
6 Trex product had exhibited defects, in an effort to induce those consumers to forego rights and  
7 remedies rightfully available to them, including the right to be reimbursed for the cost of labor  
8 necessary to remove defective Trex decking and install replacement decking;

9                   f.       Failing to make conspicuous in its warranty documents the purported  
10 disclaimers, limitations, and exclusions referenced in the preceding subparagraph c;

11                  g.       Failing to make warranty documents available to consumers at or around the  
12 time of their purchase of Trex products;

13                  h.       Failing to process consumer complaints in a timely fashion, even after being  
14 informed that defects in the product made the decks unsafe into which the product had been  
15 incorporated;

16                  i.       Demanding as a condition for agreeing to provide replacement decking a  
17 release and non-disparagement promise from consumers who reported defective decking to Trex  
18 and sought remedies, even though such releases and promises are not required of a consumer in  
19 order to avail himself or herself of such remedies, and without advising the consumer to seek legal  
20 counsel before assenting to provide such releases or promises;

21                  j.       Failing to honor its promise made to settle the previous nationwide class  
22 action brought against it, wherein the settlement agreement was ordered at its request by the New  
23 Jersey court, that it would strike the disclaimers of implied warranties from its warranty  
24 documents; and

25                  k.       Systematically discouraging consumers from availing themselves of their  
26 lawful rights to seek full redress related to their purchases of defective Trex decking materials,  
27 even as Trex acknowledged the enormous scope of the problem.  
28

1           74.     Trex willfully engaged in such practices knowing them to be unfair or deceptive, or  
2     unconscionable, and with the intent that plaintiffs and the prospective Class would act or fail to act  
3     in manners designed to advance Trex's commercial interests.

4           75.     The wrongful conduct alleged in this complaint occurred, and continues to occur, in  
5     the ordinary course of Trex's business or occupation and has caused great harm to plaintiffs and the  
6     prospective Class, who were foreseeable and direct victims thereof.

7           76.     Trex has injured the public interest, and Trex's actions continue to pose a threat to  
8     the public.

9           77.     As a direct and legal result of Trex's misleading, deceptive, unfair, false,  
10    fraudulent, and unconscionable trade practices, plaintiffs and the prospective Class have sustained  
11    damages in amounts to be proven at trial.

12          78.     As an example of the relief available to plaintiffs, Washington's Consumer  
13    Protection Act provides that an injured party may have damages; injunctive relief; treble damages  
14    to \$10,000; and the costs of suit, including a reasonable attorney's fee. RCW 19.86.090.  
15    Plaintiff Okano seeks all damages lawfully recoverable as they relate to his purchase of defective  
16    Trex decking material, to include but not be limited to, the cost of labor to remove the defective  
17    material and also to replace it with replacement material, together with any necessary supplies,  
18    which cost Trex has refused to pay, with trebling. He also seeks injunctive relief to enjoin further  
19    violations of law. And he seeks the costs of suit, including a reasonable attorney's fee.

20          79.     Trex's actions and omissions as described in this complaint also have violated the  
21    consumer protection statutes of various other states, where Trex has behaved similarly with regard  
22    to consumers who reside in those states. These actions and omissions, which have included  
23    intentional, unconscionable, and repeated deception, false promise, misrepresentation, and/or  
24    concealment, suppression, or omission of material fact, among other unconscionable behaviors,  
25    including unfair trade practices, have affected the public interest in those various states. Members  
26    of the prospective class seek the full measure of relief available at law and equity (to include or be  
27    constituted by injunctive and declaratory relief as available) under the laws of those various states,  
28    including actual damages and multiplication of actual damages as allowed by law, or restitution or

1 disgorgement, and punitive damages where available, together with the cost of suit, including  
 2 reasonable attorneys' fees. In this proposed nationwide class action, the state laws under which the  
 3 prospective Class seeks relief include:

- 4 a. Ariz. Rev. Stat. § 44-1522, *et seq.*;
- 5 b. Ark. Code § 4-88-101, *et seq.*;
- 6 c. Cal. Bus. & Prof. Code §§ 17200 and 17500, *et seq.*;
- 7 Cal. Civ. Code § 1750, *et seq.*;
- 8 d. Colo. Rev. Stat. § 6-1-101, *et seq.*;
- 9 e. Conn. Gen. Stat. § 42-110a, *et seq.*;
- 10 f. 6 Del. Code § 2511, *et seq.*;
- 11 g. D.C. Code § 28-3901, *et seq.*;
- 12 h. Fla. Stat. § 501.201, *et seq.*;
- 13 i. O.C.G.A. § 10-1-372, *et seq.*;
- 14 j. Haw. Rev. Stat. § 480, *et seq.*;
- 15 k. Idaho Code § 48-601, *et seq.*;
- 16 l. 815 ILCS § 505/1, *et seq.*;
- 17 m. Kan. Stat. § 50-626, *et seq.*;
- 18 n. Ky. Rev. Stat. Ann. § 367.110, *et seq.*;
- 19 Ky. Rev. Stat. Ann. § 365.020, *et seq.*;
- 20 o. 5 Me. Rev. Stat. § 205A, *et seq.*;
- 21 Me. Rev. Stat. Ann. 10, § 1211, *et seq.*;
- 22 p. Md. Com. Law Code § 13-101, *et seq.*;
- 23 q. Mass. Ann. Laws ch. 93A, *et seq.*;
- 24 r. Mich. Stat. § 445.901, *et seq.*;
- 25 s. Minn. Stat. § 325F.68, *et seq.*;
- 26 Minn. Stat. § 325D.45, *et seq.*;
- 27 t. Vernon's Mo. Rev. Stat. § 407.010, *et seq.*;
- 28 u. Neb. Rev. Stat. § 59-1601, *et seq.*;

- 1 Neb. Rev. Stat. § 87-301, *et seq.*;
- 2 v. Nev. Rev. Stat. § 598.0903, *et seq.*;
- 3 w. N.C. Gen. Stat. § 75-1.1, *et seq.*;
- 4 x. N.H. Rev. Stat. § 358-A:1, *et seq.*;
- 5 y. N.J. Stat. Ann. § 56:8-1, *et seq.*;
- 6 z. N.M. Stat. Ann. § 57-12-1, *et seq.*;
- 7 aa. N.Y. Gen. Bus. Law § 349, *et seq.*;
- 8 bb. N.D. Cent. Code § 51-15-01, *et seq.*;
- 9 cc. Okla. Stat. tit. 15 § 751, *et seq.*;
- 10 dd. Or. Rev. Stat. § 646.605, *et seq.*;
- 11 ee. R.I. Gen. Laws. § 6-13.1-1, *et seq.*;
- 12 ff. S.C. Code Laws § 39-5-10, *et seq.*;
- 13 gg. S.D. Code Laws § 37-24-1, *et seq.*;
- 14 hh. Tex. Bus. & Com. Code §§ 17.41-17.63;
- 15 ii. Vt. Stat. Ann. tit. 9, § 2451, *et seq.*;
- 16 jj. RCW 19.86.010, *et seq.*;
- 17 kk. West Virginia Code §46A-6-101, *et seq.*; and
- 18 ll. Wis. Stat. § 100.18, *et seq.*

# **PRAYER FOR RELIEF**

20 WHEREFORE, having stated the foregoing allegations and claims, plaintiffs pray:

- 21 A. That the Court determine that this action may be maintained as a class action
- 22 pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure with respect to their and the
- 23 prospective Class's claims for equitable and injunctive relief, and Rule 23(b)(3) of the Federal
- 24 Rules of Civil Procedure with respect to their and the prospective Class's claims for damages, and
- 25 declaring them representatives of the Class and their counsel as counsel for the Class;
- 26 B. That the conduct alleged herein be declared, adjudged, and decreed to be unlawful;
- 27 C. That the Trex warranty documents be re-formed as necessary, or that certain
- 28 provisions therein be disregarded as invalid or unenforceable, to permit them and the Class the full

panoply of remedies available to them for breach of warranty, express and implied, under Article 2 of the Uniform Commercial Code (or the applicable provisions of the Civil Code of Louisiana, as appropriate) as adopted in their respective states, or otherwise;

D. That they and the Class be afforded all remedies available to them at law or equity, including but not limited to, awards of damages, restitution, or disgorgement under the consumer protection laws of the various states, as applicable, in such amounts to be determined at trial, with trebling or other multiplying where permitted by law;

E. That they and the Class be granted an award of punitive damages as available at law or equity, and in an amount to be determined at trial;

F. That Trex be enjoined from continuing the illegal activities alleged herein;

G. That they and the Class recover their costs of suit, including reasonable attorneys' fees and expenses as provided by law; and

H. That they and the Class be granted such other, further, and different relief as the nature of the case may require or as may be determined to be just, equitable, and proper by this Court.

#### DEMAND FOR JURY

Plaintiffs and the prospective Class respectfully demand a jury trial on all issues so triable.

DATED: June 1, 2009.

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